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Via Certified U.S. Mail

November 28, 2018

Mr. Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Chris Hladick
Regional Administrator
EPA Region 10
1200 6th Avenue
Seattle, WA 98101

Mr. Matthew Z. Leopold
General Counsel
U.S. Environmental Protection Agency
Mail code: 2310A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Allyn Stern
Regional Counsel
EPA Region 10
1200 6th Avenue
Seattle, WA 98101

Re: *Nw. Env'tl. Advocates v. City of Medford* (D. Or. No. 1:18-CV-00856-CL)
Document Subpoena under Fed. R. Civ. P. 45 and 40 C.F.R. § 2.405

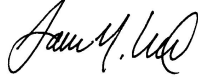
To Those Addressed Above:

Enclosed please find a subpoena for the production of documents, hereby served by Northwest Environmental Advocates ("NWEA") by its undersigned counsel upon the United States Environmental Protection Agency ("EPA") in the above-referenced case pursuant to Fed. R. Civ. P. 45 and 40 C.F.R. § 2.405. The subpoena commands EPA to produce those documents identified in the attachment to the subpoena to NWEA's counsel within 30 days of service.

Additionally, by this letter NWEA respectfully requests, pursuant to 40 C.F.R. § 2.406 and Fed. R. Civ. P. 44(a)(1), that EPA provide authenticated copies of all documents produced in response to the enclosed subpoena, as well as (to the extent not provided in response to the subpoena) authenticated copies of the records linked on the following EPA webpage: Impaired Waters and TMDLs: Partial Approval and Partial Disapproval of Oregon 2012 303d List, at <https://www.epa.gov/tmdl/partial-approval-and-partial-disapproval-oregon-2012-303d-list>.

Should you have any questions about the enclosed subpoena, please feel free to contact me at (503) 768-6929 or jsaul@lclark.edu. Thank you in advance for your prompt attention and timely response to this subpoena.

Sincerely,

A handwritten signature in black ink, appearing to read "James N. Saul". The signature is fluid and cursive, with the first name "James" being more prominent.

James N. Saul

cc: Beth Ginsberg, Esq. (beth.ginsberg@stoel.com)
Michael Campbell, Esq. (michael.campbell@stoel.com)
Crystal Chase, Esq. (crystal.chase@stoel.com)

UNITED STATES DISTRICT COURT

for the
District of Oregon

Northwest Environmental Advocates

Plaintiff

v.

City of Medford

Defendant

Civil Action No. 18-cv-00856

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: United States Environmental Protection Agency

(Name of person to whom this subpoena is directed)

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

Please see Attachment A

Place: Earthrise Law Center, Lewis & Clark Law School 10015 SW Terwilliger Blvd., Portland OR 97219	Date and Time: 12/28/2018 9:00 am
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☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/28/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Northwest Environmental Advocates, who issues or requests this subpoena, are:
James Saul, Earthrise Law Center, 10015 SW Terwilliger Blvd., Portland, OR 97219 (503) 768-6929 jsaul@lclark.edu

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 18-cv-00856

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) **For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) **For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) **Command to Produce Materials or Permit Inspection.**

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) **Quashing or Modifying a Subpoena.**

(A) **When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) **Claiming Privilege or Protection.**

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) **Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

ATTACHMENT A

Pursuant to Federal Rule of Civil Procedure 45, Northwest Environmental Advocates (“NWEA”), by and through its undersigned counsel, requests that the United States Environmental Protection Agency (“EPA”) produce the following documents at the offices of Earthrise Law Center, c/o James N. Saul, Lewis & Clark Law School, 10015 SW Terwilliger Blvd., Portland, Oregon 97219, within 30 days of service hereof.

DEFINITIONS

As used in this request, the following terms are defined as follows:

1. “Any” should be construed to include “all,” and “all” should be construed to include “any.”
2. “Biocriterion” means the narrative water quality criterion promulgated by DEQ and codified at Or. Admin. R. 340-041-0011.
3. “Communication” or “communications” means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) including, but not limited to, oral conversations, written correspondence, memoranda, telephone conversations, text messages, correspondence, notes, and electronic mail (“email”)—whether as a sender, recipient, cc, or bcc.
4. “Concerning” means referring to, describing, evidencing, or constituting.
5. “DEQ” means the Oregon Department of Environmental Quality, along with its directors, employees, officers, elected or appointed officials, agents, attorneys, consultants, or contractors.
6. “Document” is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a

separate document within the meaning of this term. “Document,” “documents,” and “documentation” include, without limitation, every written, recorded or graphic representation, in the possession, custody or control of EPA or of its counsel, or known to EPA or its counsel, and include the original, or a copy when the original is not available, and each non-identical copy, including those which are non-identical by reason of notations or markings, of: drawings, specifications, letters, memoranda, email, notes, minutes, reports, studies, summaries, pamphlets, telegrams, booklets, photographs, purchase orders, bills, checks, drawings, charges, tapes, computer tapes, diaries, statistical statements, plans, contracts, agreements, leases, invoices, appraisals, analyses, studies, electronic media, data compilations, and any and all other materials of any tangible medium of expression, including any and all attachments to and enclosures to any requested items.

7. “EPA” means the United States Environmental Protection Agency along with its directors, employees, officers, elected or appointed officials, agents, attorneys, consultants, or contractors.

8. “ESI” means electronically stored information.

9. “Including” means including, but not limited to.

10. “Narrative Criteria” means the narrative water quality criteria promulgated by DEQ and codified at Or. Admin. R. 340-041-0007.

11. The term “person” or “individual” is defined as any natural person or any business, legal, or governmental entity or association including, but not limited to, any corporation, partnership, other business association, joint venture, sole proprietorship, limited liability company, firm or other business enterprise or legal entity, any natural person, any domestic or foreign governmental body, commission, board, agency, branch, or department,

individual, natural person, or any agents, attorneys, officers, directors, representatives, employees, subsidiaries, subdivisions, affiliates, and parts thereof.

12. “Possession” means a document or thing in EPA’s possession, custody or control that EPA has access to, or, through reasonable investigation, inquiry, or reach, might obtain access to, or that EPA is in a position to cause its production. This request may require EPA or its counsel to seek and obtain specifically requested information and documents.

13. “Relate to,” “related to,” or “relating to” means, but is not limited to, in relation to, leading to, pursuant to, referring to, associated with, regarding, about, derived from, informed by, compiled with, contemporaneous with, required by, subject to, directed toward, affiliated with, akin to, connected with, germane to, pertinent to, relevant to, and about.

14. “You” and “your” refers to EPA, to whom this request is directed, individually, and all of its employees, agents, accountants, attorneys, representatives, and all other persons who have documents or information deemed to be in their possession, custody, or control.

15. The terms “plaintiff” and “defendant” as well as a party’s full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

16. Words in the singular include their plural meaning, and vice versa. The past tense includes the present tense where the clear meaning is not distorted by a change of terms, and words used in the masculine gender shall include the feminine gender.

17. References to persons and other entities include their agents, employees, representatives, and attorneys.

INSTRUCTIONS

1. These are general instructions. Please see Federal Rule of Civil Procedure 45 for additional requirements.

2. Unless otherwise specified, this subpoena seeks documents that were created or modified on or after January 1, 2010.

3. This subpoena requires production of documents or things that are in your possession, custody, or control, and documents or things that are in the possession, custody, or control of your agents, employees, accountants, attorneys, representatives, or other persons who have documents deemed to be in your possession, custody, or control.

4. Pursuant to 40 C.F.R. § 2.406, Fed. R. Civ. P. 44(a)(1), and Fed. R. Evid. 902(4), please produce authenticated and certified copies of all documents in response to this subpoena. Please enclose with the document production a certificate made under seal by the officer(s) or custodian(s) with legal custody of the responsive documents attesting to the fact that the documents produced are correct copies of the documents in EPA's custody or control.

5. If you claim that you are not required to produce any document herein requested, either in full or in part, as a result of the application of any privilege or other protection against discovery, you are requested to identify such documents, state with particularity the reason or reasons why the document was not produced in full or in part, and describe to the best of your knowledge, information, or belief the author, recipient, date, and subject matter with sufficient particularity that a determination can be made with respect to the applicability of any claim of privilege or other protection against discovery.

6. If responsive documents are kept together in the usual course of business, they are to be so produced, in order to fairly reveal and not to distort the order of your filing and record keeping system.

7. File folders, complete with tabs or labels, are to be produced for each file folder in your files from which documents are produced in response to this discovery request. The file folders shall be produced intact with the documents produced therefrom.

8. ESI includes all documents that exist in electronic format. Unless otherwise indicated, all ESI, including emails, should be produced in word-searchable PDF files, with each document as a separate, individual PDF. All non-privileged, responsive attachments to emails should be produced immediately following their parent email.

9. Microsoft Excel documents should be produced in native format with all metadata preserved. Spreadsheets created with other software should be produced in a comma-delimited format capable of being opened in Excel, if possible.

10. Microsoft PowerPoint documents should be produced in native format with all metadata preserved, including speaker notes.

11. Audio, video, or other recorded information shall be provided separately on a DVD or other storage in .wav or .mpeg format.

12. All hardcopy documents for which native electronic files never existed, no longer exist, or are not reasonably accessible should also be produced in single PDF files. This includes, but is not limited to, scanned images of those documents which contain unique information after they were printed out, such as paper documents containing handwriting, signatures, marginalia, drawings, annotations, highlighting, and redactions. All scanned documents should be kept as

they are in the regular course of business or in the alternative provide information identifying the custodian for each document.

13. All pages shall be labeled with a Bates number or control number.

14. The existing file names of all ESI should be preserved, and not altered in any way, except that the beginning Bates number or Bates range should be inserted at the beginning of the file name, as follows: “[Bates range – Original title of file].”

15. Documents consisting of or including attachments or exhibits to other documents should be produced in a manner that preserves the relationship between such master document and its attachments or exhibits.

16. The documents produced pursuant to this request are to be separated and identified by the number of the request to which they are responsive.

17. NWEA reserves the right to request additional documents in native format if it is determined the document is not readable or useable in the format as provided by EPA.

18. Unless otherwise specifically stated, all requests call for production of documents prepared, received, or dated at any time prior to and including the date of production. If documents responsive to the requests have already been provided or produced in this litigation, identify with specificity which previously provided or produced documents satisfy which document requests.

19. This request is intended to be perpetual throughout the pendency of this action, such that any new documents or information falling within the scope of any request below should be reported to NWEA’s attorney within thirty (30) days after such documents and information come into the possession, custody and control of EPA or its counsel, and such shorter time as may be reasonable in the event such information or documents are obtained

within ninety (90) days of any summary judgment briefing deadline or trial date set in this action.

DOCUMENT REQUESTS

Please produce the following documents:

1. All documents related to any effort made by EPA to ascertain the extent to which the Middle Rogue River (Hydrologic Unit Code 17100308), or any segment thereof, attains or fails to attain Oregon's Biocriterion or Narrative Criteria.
2. All documents related to EPA's proposal, dated December 21, 2016, to list the Middle Rogue River (Hydrologic Unit Code 17100308) on Oregon's 2012 Clean Water Act section 1313(d) list for Oregon's Biocriterion.¹
3. All documents reflecting official EPA or DEQ policy regarding the interpretation, application, or enforcement of Oregon's Biocriterion or Narrative Criteria.

Dated: November 28, 2018.

s/ James Saul
James Saul (OSB #152809)
Lia Comerford (OSB #141513)
Earthrise Law Center at
Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland, OR 97219
Tel. (503) 768-6929
Fax (503) 768-6642
jsaul@lclark.edu
comerford@lclark.edu

*Counsel for Plaintiff Northwest
Environmental Advocates*

¹ See EPA, Partial Approval and Partial Disapproval of Oregon 2012 303d List, Enclosure 4: EPA Proposed Additions, available at <https://www.epa.gov/tmdl/partial-approval-and-partial-disapproval-oregon-2012-303d-list> (last visited Nov. 26, 2018).

CERTIFICATE OF SERVICE

I, James N. Saul, counsel for plaintiff Northwest Environmental Advocates, hereby certify that on November 28, 2018, I caused a true and correct copy of the foregoing subpoena for the production of documents to be served upon the United States Environmental Protection Agency by mailing the same via Certified U.S. Mail to the following:

Mr. Andrew Wheeler Administrator U.S. Environmental Protection Agency Mail Code 1101A 1200 Pennsylvania Avenue, N.W. Washington, DC 20460	Mr. Chris Hladick Regional Administrator EPA Region 10 1200 6th Avenue Seattle, WA 98101
Mr. Matthew Z. Leopold General Counsel U.S. Environmental Protection Agency Mail code: 2310A 1200 Pennsylvania Avenue, N.W. Washington, DC 20460	Mr. Allyn Stern Regional Counsel EPA Region 10 1200 6th Avenue Seattle, WA 98101

Date: November 28, 2018

s/ James N. Saul
James N. Saul